

U.S. Department of Labor

Office of Administrative Law Judges
2 Executive Campus, Suite 450
Cherry Hill, NJ 08002

(856) 486-3800
(856) 486-3806 (FAX)



Issue Date: 02 February 2004

CASE NO.: 2003-SOX-00008

In the Matter of:

MARGOT GETMAN
Complainant

v.

SOUTHWEST SECURITIES, INC.
Respondent

Appearances: Margot Getman, Pro se
Complainant

Stuart Blaugrund, Esq.
Respondent

Celeste Winford, Esq.
Respondent

Before: Paul H. Teitler
Administrative Law Judge

DECISION AND ORDER

This matter arises under the employee protection provision of Public Law 107-204, Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A (the Act) enacted on July 30, 2002. 18 U.S.C. § 1514A(b)(2)(B) provides that an action under Section 806 of the Act will be governed by 49 U.S.C. § 42121(b), which is part of Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (the AIR 21 Act). The Act affords protection from employment discrimination to employees of companies with a class of securities registered under section 12 of the Security Exchange Act of 1934 (15 U.S.C. 781) and companies required to file reports under Section 15(d) of the Securities Exchange Act of 1934. Specifically, the law protects so-called "whistleblower" employees from retaliatory or discriminatory actions by their employer because the employee provided information to their employer or a federal agency or Congress relating to alleged violations of 18 U.S.C. §§ 1341, 1343, 1344 or 1348, or any provision of Federal law relating to fraud against shareholders.

Because of its recent enactment, the Act lacks a developed body of case law. Consequently, I will base my decision in this matter on the body of law developed under other whistleblower acts. I will give particular regard to AIR 21 Act case law, an act which provides the procedures under which a claim under the Act is to be handled.

PROCEDURAL BACKGROUND

Margot Getman (Complainant) was employed by Southwest Securities (Respondent) as a research analyst until her termination on July 31, 2002.¹ On October 15, 2002, Complainant first attempted to file a claim against Respondent by contacting the New York State Attorney General's Office. Complainant then contacted the Ft. Worth, Texas office of the Securities and Exchange Commission (SEC) on October 25, 2002 and on October 29, 2002. On October 25, 2002 Complainant contacted Congressman Michael Oxley's office and on October 30, 2002 she again contacted the Ft. Worth, Texas office of the SEC. Finally, on November 1, 2002 Complainant contacted the Occupational Safety and Health Administration (OSHA), U.S. Department of Labor, regional office in New York City and filed her claim under 18 U.S.C. 1514A of the Act, alleging that Respondent had discriminated against her in violation of the Act.²

On February 12, 2003, after an investigation of the complaint, OSHA notified the parties that it found no violation of the Act's employee protection provisions. On February 24, 2003, Complainant objected to the findings and requested an administrative hearing. A Notice of Hearing dated March 21, 2003 was issued setting a hearing date of May 20, 2003 in Elizabethtown, New York. Complainant, in a letter dated April 29, 2003, requested that the hearing be continued. A June 3, 2003 Notice of Rescheduled Hearing changed the date of the hearing to August 26, 2003. The hearing was held as scheduled over a two day period.

ISSUES

1. Was Complainant engaged in activity protected under the Act?
2. If Complainant engaged in protected activity, was Respondent aware of this activity and did this awareness contribute to Respondent's decision to terminate Complainant's employment?
3. If Complainant's protected activity is found to have contributed to her termination, has Respondent demonstrated by clear and convincing evidence that it would have terminated Complainant even in the absence of the protected activity?
4. What damages, if any, is Respondent liable to Complainant for as a result of violating the Act?

¹ During her term of employment with Respondent, Complainant's legal last name was Durow. She subsequently resumed using her maiden name, Getman.

² Respondent has alleged that the complaint in this matter is untimely because it was filed with OSHA two days beyond the allotted 90 day period within which to file a complaint. However, the record shows that Complainant attempted to file her complaint with various governmental agencies and officials prior to the expiration of the 90 day period. Based on her attempts to file her claim in the wrong forums, I find that Complainant equitably tolled her claim. *School Dist. of the City of Allentown v. Marshall*, 657 F.2d 16, 19-21 (3d Cir. 1981).

SUMMARY OF DOCUMENTARY EVIDENCE AND TESTIMONY

My decision in this case is based on the sworn testimony presented at the hearing and the following documents admitted into evidence: CX 1, CX 2, CX 5 to CX 20, CX 24, RX 2, and RX 4 to RX 11.³ CX 23 was rejected at the hearing. Each exhibit entered in TO evidence, although possibly not mentioned in this Decision, has been carefully reviewed and considered in light of its relevance to the resolution of a contested issue. The relevant evidence and testimony is summarized below.

EXHIBITS

Complainant's exhibits

CX 1

Summer 2001 industry report titled *A Marriage of Necessity: Informatics and Life Science*. The report, written by Complainant and her then assistant Hai Wang, summarizes the market potential of information technology firms involved with the pharmaceutical and biotech industries.

CX 2

Graph depicting the value of Cholestech stock over the period from January 2, 2001 through August 2, 2003. The stock's price during November of 2001 fluctuated between \$20 and \$25, following a sharp increase over the preceding three month period. From July 2003 through August 2, 2003 the price of the stock was below \$10.

CX 5

December 12, 2002 letter from Respondent's attorney to Teri Wigger, Regional Investigator for OSHA. In this letter, Respondent outlined its position regarding Complainant's complaint under the Act. Of note is Respondent's assertion, contained in a footnote on page three of the letter, that "[Respondent] maintains that at no time was [Complainant] forced to endorse this stock as a 'strong buy.' Rather, [Respondent] maintains that the review committee questioned her inability to explain the reasoning behind her 'accumulate' rating."

The letter also provides the following description of how the research department at Respondent functioned and the role of analysts in the department:

[Respondent's] research department provides information on companies and their stock offerings to the investment community. Analysts in the research department are responsible for working with [Respondent's] institutional sales force to provide investors with comprehensive investment services. To accomplish this, analysts are expected to establish expertise in their respective industries, develop relationships with various industry participants and competitors, carefully select which companies they will cover and create reports on industry trends and on the companies within their coverage.

³ Abbreviations used throughout this decision and order include: "CX" for Complainant's exhibit, "RX" for Respondent's exhibit, and "TR" for the transcript of the August 26-27th, 2003 hearing.

[Respondent] analysts generate regular reports on their companies and present these reports to [Respondent's] Review Committee when launching new companies. These reports require substantial research into both the companies and the industries in which the companies function. They analyze issues such as company growth, potential problems with growth, projected earnings, long and short-term trends, and business and stock performance. The reports provide detailed models from which the analysts determine industry trends and specific company prospects to make final projections and ultimately specific stock recommendations to institutional and retail clients.

The purpose of [Respondent's] Review Committee is to prepare analysts to present their stocks to the sales force as well as to [Respondent's] clients. The Committee studies each company report and provides analysts with feedback on their reports and valuations. Committee members challenge the analysts' decisions to determine whether their ratings and recommendations are accurate and supported by concrete evidence. Analysts are expected to provide justification and documentation to support their recommendations during Review Committee presentations.

In addition to the initial research and reporting to the Review Committee, analysts must stay abreast of company announcements and related information on an ongoing basis and must disseminate any newly acquired information to the sales force as quickly as possible. Therefore, analysts meet daily with the [Respondent] sales force to present them with the latest data on their companies' performance to allow sales professionals to determine how to advise their clients with respect to stock sales and purchases. Analysts gain the confidence of [Respondent's] sales force by demonstrating that they maintain a comprehensive understanding of company details and that they can quickly interpret the effects of company announcements on market performance. It is integral that the sales force trust the recommendations made by analysts and feel confident in dispensing investment advice to [Respondent's] clients based on the analysts' valuations and recommendations

CX 6

May 2, 2003 email from John McAlister, President and CEO of Tripos, Inc., to Complainant. In the email McAlister described Complainant's performance during the spring 2002 trip he took to Minnesota and Wisconsin with Complainant and Joe Sorensen, a sales representative for Respondent. McAlister stated that Complainant represented herself and her company competently, that she understood Tripos and its potential, and that she was professional and very easy to work with. He also confirmed that there were no organizational difficulties associated with Complainant's performance and that the trip was arranged by the sales representatives, not Complainant. Further, McAlister stated that Tripos's management did not attend trips to St. Louis and Kansas City because it had not been invited to do so by Respondent's sales representatives.

CX 7

August 9, 2003 notarized affidavit, also by McAlister. In the affidavit McAlister reiterated his May 2, 2003 email to Complainant, adding that there were no organizational difficulties regarding the trip he took with Complainant to Toronto. He further added that the meetings, handouts and transportation for the trip were the responsibility of the sales representative and not Complainant. Regarding the meetings, Complainant never missed a meeting during the Tripos promotion trips. Finally, McAlister stated that during the trip Don Hultgren and Pat Jaeckle, respectively Respondent's head of capital markets and a banker for Respondent, "spoke glowingly of [Complainant]'s contribution to [Respondent]'s Healthcare Team and her value in supporting Tripos stock. This was done with considerable documentation attesting to the number of notes and calls that [Complainant] had done on Tripos."

CX 8

August 13, 2003 notarized affidavit by Jacqueline Doeler, portfolio manager for the State of Wisconsin Investment Board. Doeler stated that she had been acquainted with Complainant since the mid-1990's and found her to be "competent in her area of coverage and responsive to my questions and concerns" and that she "never knew her to be less than professional and responsible." When Complainant brought potential companies to the Investment Board, "she was prepared, punctual, and pleasant." Doeler noted that in making investment decisions she, Doeler, would contact multiple analysts covering the same company and industry.

CX 9

August 7, 2003 notarized affidavit by John Kreger, former co-worker of Complainant. Kreger stated that he had known Complainant since 1996 when they worked together at Vector Industries. He had found Complainant to "be a very competent equity research analyst, displaying in the process integrity and honesty that were beyond reproach." Kreger could not recall Complainant ever "being significantly late to a meeting, let alone sleeping through a meeting."

CX 10

August 15, 2003 notarized affidavit by Allan Kellis, director of investor relations at Cerner Corporation. Kellis stated that he had known Complainant since the spring of 2001 when she began her coverage of the healthcare information technology sector. Through his contact with her he found her reports to be "well researched and written." The research was based on different sources and was diligently performed. Kellis was sufficiently impressed with her performance to invite her to make a presentation to other industry analysts.

CX 11

August 6, 2003 notarized affidavit by Barbara Neal, a professional counselor. Neal stated that she began counseling Complainant on the issue of work/life balance but that over time the topic of counseling shifted toward discussing Complainant's work environment. Complainant related to Neal that her work environment had become openly hostile as a result of her refusal to change her rating on a company. The situation eroded to the point that Complainant no longer looked forward to working and would sometimes cry. Complainant also stated to Neal that she believed Respondent was "deliberately creating a hostile environment in hopes that [she] would leave the company voluntarily."

CX 12

July 5, 2002 medical examination report by Dr. Kerry Inzer. Complainant had sought treatment for stomach pains she attributed to a possible ulcer. Complainant also indicated that she experienced periodic “‘fuzziness’ in her head.”

CX 13

Research report on Cholestech Corporation. The report appears to be a rough draft since it contains extensive hand written notes and corrections. The first page indicates that coverage on Cholestech was initiated during the week of the 5th in October of 2001.

CX 14

August 1, 2002 Form U-5, titled “Uniform Termination Notice for Securities Industry Registration,” documenting Complainant’s termination by Respondent. The U-5 was completed by Respondent. In the section of the document titled “Reason for Termination” it lists “personnel issues.”

CX 14B⁴

December 18, 2002 memo to file by Teri Wigger, regional investigator for OSHA. The memo contains Wigger’s summary of her telephone interview with Todd Allen. Allen was employed by Respondent as an analyst in the technology sector until July of 2001, when he was laid off due to market declines. He offered that there was no “bad blood” between himself and Respondent regarding his performance and that Respondent had honored his contract by paying him his end of the year bonus even after he had been terminated. Allen recounted the following to Wigger regarding Respondent’s interest in Cholestech:

...[I]t had been “common water cooler discussion” that the Complainant was initiating coverage on Cholestech and that it had investment banking interest with [Respondent]. If the investment banking deal went through for [Respondent] it would have been a very big pay day. [Respondent] did not have much banking business and this would have meant a great deal. It was also common knowledge by the analysts that management, [Ozarslan] Tangun and Don Hutgren, did not want accumulate ratings. They “strongly suggested” that the analysts issue either buy or hold ratings, not accumulate. Management used the term “nontransactional” for accumulate ratings meaning that the rating did not generate a buy or sell action by the consumer. If the analyst declined to issue one of those ratings or change an accumulate rating their research that took 1-2 months would not be published and they would have wasted a great deal of time. Because of management’s position on accumulate ratings it was more likely that the analyst would change their rating from an accumulate to a buy rather than have their work go unpublished.

Allen admitted that he had responded to pressure from Respondent’s managers on several occasions and had changed ratings from ‘accumulate’ to ‘buy.’ Allen also testified that Tangun

⁴ In the record both this memo and the August 1, 2002 U-5 are marked as being exhibit “CX 14.” I will refer to the memo, dated December 18, 2002, as being exhibit “CX 14B.”

and Hultgren “strongly suggested” to analysts that they issue earnings estimates that were “a little higher than the rest of the ‘street’” to attract attention. He stated his opinion that Respondent had been actively seeking a justifiable reason to terminate Complainant and thereby avoid honoring its contract with her. In Allen’s view, the email Complainant sent to Kreger (RX 10), and cited by Respondent in terminating Complainant’s employment, did not refer business to a competitor. Instead, Allen offered that the email was completely proper and that Complainant “was doing her job” by writing it. He reasoned that if she had not supplied the information it would have appeared as if she lacked knowledge and was “incompetent.” Allen also addressed the issue of the trips taken by Respondent’s salesmen and analysts with the management of the companies they covered. He stated that these trips were only occasionally set up by the analysts and that he was “unaware of any situations in which the Complainant was unprepared at meetings or unable to discuss the companies she provided coverage on.” He never saw Complainant “out of touch or slow to respond.” Finally, Allen stated that Respondent followed a practice of “issuing negative performance reviews and aggressively document[ing] all problems whether big or small so that when they wanted to they could shake the employee lose (sic).” Allen added that in the two preceding years Respondent “had a 100% turnover rate.”

CX 15

January 15, 2003 statement by Hai Wang. The letterhead of the statement is that of the U.S. Department of Labor, OSHA. Wang signed the statement but his signature was neither witnessed nor notarized. Wang stated that he was Claimant’s assistant for ten months and that his termination at the end of August 2001 was the result of budgetary reasons. He described a March 2001 review committee meeting that he attended with Complainant. Wang alleged that Don Hultgren implied that Complainant should increase her price estimate of a company’s stock in order to attract the attention of potential clients. Wang also stated that Complainant did not enjoy the same level of trust experienced by other analysts because the industry she covered had entered a downturn and Complainant could therefore not give the strong sale ratings that the sales force preferred.

CX 17

August 9, 2002 letter from Carla Hatcher, Esq., then Complainant’s attorney, to Respondent employee Don Bucholtz. The purpose of the letter was to request that Respondent pay Complainant \$225,890.40, representing the balance of her contract through its October 1, 2003 termination. The letter states that if the requested amount was not paid Complainant would initiate legal action against Respondent.

Respondent’s exhibits

RX 2

Copy of research report on Cholestech. The report is not dated but under “Initiating Coverage” it indicates “November X, 2001.” The report is titled the generic name “NEWCO.” Cholestech is mentioned by name in the body of the report. The report does not list a rating for Cholestech’s stock.

RX 4

April 2, 2002 email from Christopher “Kit” Case, Respondent’s associate director of research, to Ozarslan Tangun. In the email Case stated that Complainant did not “know her companies” and was unable to answer basic questions. Case also stated that he had been told by an individual named Ken that Complainant was “losing credibility with the sales force rapidly because she is not prepared” and that another person answered her questions for her.

RX 5

June 19, 2002 email from Ozarslan Tangun to Complainant. In the email Tangun stated that he had written the email in order to supply Complainant with feedback. Tangun offered that she needed to be better prepared for her presentations, needed to arrive at the office before 6:45, should learn the details regarding the companies she covered and not rely on her assistant to supply them, and needed to be more diligent in her analysis by utilizing more supporting evidence.

RX 6

May 12, 2003 *Wall Street Journal* reprint titled “Best on Wall Street.” The article indicates that Ozarslan Tangun was the highest ranked specialty-retail analyst for 2002.

RX 7

June 28, 2002 email from Kit Case to Ozarslan Tangun. Case stated that Complainant had been absent from the office the previous day and was already supposed to have returned. However, according to Case, she had not returned, had not checked her messages and had not called to check in. He was concerned because a company called Eclipsis had the evening before released negative information. Case concluded by stating “[w]e lost some ground with the salesforce because of her refusal to take responsibility and be available. She is of no use to us.”

RX 8

June 28, 2002 memo from Case to Tangun; this email was written later in the same morning as RX 6. Case stated that Complainant was irresponsible for not contacting him. He complained that because she had not scheduled her trip in the manner required by Respondent he lacked information concerning a trip Complainant had returned from the previous evening. He concluded that she was avoiding him and that this avoidance indicated her attitude toward the job and her responsibilities.

RX 9

June 19, 2002 memo from Joe Sorensen, Respondent’s senior vice president of institutional equity sales, to Tangun. In relation to the trip he had taken with Complainant and the management of Tripos, Sorensen alleged that Complainant did not bring the reports, itinerary or spread sheets she was asked to bring, was generally disorganized, and missed meetings in St. Louis and Kansas City. For a trip to Canada she neglected to carry proper immigration documentation. In addition, she rented a car during a trip to Chicago after she had been instructed not to. Sorensen also stated that Complainant was disorganized at daily meetings in that she was incapable of supplying necessary information. He concluded by stating that he had written the email at Tangun’s request.

RX 10

July 18, 2002 email from Complainant to John Kreger, employee of William Blair and Company. In the email, quoted here in its entirety, Complainant stated: “You might be getting a call from Craig Behnke at Founders about PRW. [C]alled here and we talked a little but he wanted a little more granularity that I thought I provided. I told him you’re the senior guy, etc....[.]”

RX 11

Undated memo titled “Notes of meeting with [Complainant],” signed by Jim Zimcosky, Respondent’s director of human resources. Zimcosky stated in the memo that he, along with Tangun, met with Complainant on July 31, 2002. Before the meeting Tangun had explained to Complainant that the purpose of the meeting was to inform her that “he was terminating her employment for cause.” Tangun stated to Complainant that she was being terminated for several reasons: he had received complaints about her from the salesmen; she was not prepared for morning meetings; she lacked sufficient knowledge of the companies she covered; and, when leaving the office, she failed to alert him where she would be and did not provide a means of contacting her. Zimcosky stated that Complainant acknowledged having discussed these issues with Tangun but disagreed with Tangun’s opinions regarding them. The last basis for termination Tangun raised at the meeting was the July 19, 2002 email Complainant sent to William Blair and Co. employee John Kreger. Based on the contents of the email, Tangun accused Complainant of giving “the impression that she did not know her research universe” by referring the customer to a competitor, a competitor whom she referred to as the “senior guy following the company.” According to Zimcosky, Complainant acknowledged the email but was unable to provide an explanation for sending it.

TESTIMONY

Margot Getman

Ms. Getman, Complainant, testified that she was hired by Respondent in October of 2000 as an equity research analyst. (TR 9). Her employment contract with Respondent was to be for three years and provide a salary of \$100,000 per year with minimum bonuses of \$50,000 per year. The business sector she was hired to cover was healthcare technology. Prior to working for Respondent she had fifteen years of experience as a healthcare analyst. (TR 10). Complainant’s job duties at Respondent were to initiate coverage on certain companies in her sector and to write institutional sales reports on the companies she covered. (TR 11). The reports were intended to alert potential investors and client companies that Respondent had an expert in the given business sector. (TR 12). The goal was for the Respondent to then generate income through the sale of a company’s stocks or by participating in a new public offering of stock by the company. Complainant testified that writing the reports was a long and complex educational process during which she would spend three months gathering company information. (TR 15). She gathered information from sources such as the company itself, its customers, and trade associations. Prior to November of 2001, Complainant completed a total of nine company reports and two industry reports. (TR 16). Complainant stated that the complexity of the industry she was covering was reflected in the fact that she was given a three year contract, an unusual arrangement in the industry. (TR 16). She was hired by Don Hultgren, who was at the time Respondent’s head of capital markets. (TR 16-17). Complainant’s educational and employment background include a

master's degree in business administration (MBA) from Rutgers University and twenty years of investment industry experience following healthcare-related companies. (TR 71-72). Prior to her position with Respondent, Complainant held analyst positions at Cigna Insurance as a vice president covering healthcare services, Fidelity Union Bank, Vector Securities as a vice president, and at Punk, Ziegel and Knoell as a senior healthcare analyst. (TR 72-73). Cross examined on the issues of her employment history, Complainant said that she was terminated from her positions with Vector Securities and Punk, Ziegel and Knoell. (TR 75). Complainant had never managed nor received formal education in how to run a research equity department. (TR 75-76). With Respondent she was covering a sector she had never reviewed before, the healthcare information technology sector. (TR 76).

One of the companies Complainant testified that she covered and wrote a research report on was Cholestech. (TR 17). She had first been alerted to this company by two of Respondent's bankers, Pat Jakely and Larry Wile. Jakely and Wile explained to Complainant that Cholestech chief operating officer William Burke had expressed to them his company's need for research coverage. Cholestech was interested in raising capital and if Respondent issued a report on the company it, Respondent, would be included in the deal to raise capital. (TR 17). Complainant wrote a research report on Cholestech that she presented at a review committee in November of 2001. Complainant could not remember the exact date of the meeting. (TR 28). The purpose of the review committee was for its members to ask Complainant questions regarding Cholestech and its stock. (TR 28). The committee was composed of Hultgren, Tangun, Case, Jakely, Wile, and Rob Blakney, who was Complainant's assistant. (TR 27). Complainant stated that it was unusual for there to be bankers, namely Jakely and Wile, on a review committee and that to her knowledge Respondent was the only research firm to include them on the committee. (TR 28). All participants asked questions and made suggestions, in particular Hultgren and Jakely. Hultgren questioned Complainant regarding the "accumulate" rating she had given Cholestech. (TR 29). According to Complainant, "accumulate" was not a strong rating and her reason for applying it to Cholestech's stock was that it had increased in value appreciably from the time she started her research, leading her to doubt that it would continue to appreciate in value. Complainant added that the impact of her giving Cholestech's stock an "accumulate" rating was that Respondent would not be included in any banking deal Cholestech might undertake. A banking deal would have generated significant revenues for Respondent. According to Complainant, the committee was not pleased with her "accumulate" rating for the stock. (TR 29). Hultgren's demeanor in particular indicated that he wanted a stronger rating for the stock. (TR 30). The emphasis of his questions regarded why Complainant had not rated the stock a "strong buy" since she did not know for certain that the stock had stopped increasing in value. (TR 30-31). However, at no point did the committee members tell Complainant to change her rating or tell her that they were displeased with her rating. (TR 33). Her belief that they were displeased was based on her interpretation of what the members said. (TR 34). The meeting concluded with Complainant feeling compelled to tell the committee that it could put a stronger "buy" rating on the stock if it wanted to but that as a result she would then not sign her name to the report. (TR 32-33). Although all of her reports prior to Cholestech had been published, this report was not published. (TR 38, 46). After the report was not published, Complainant's relationship with Tangun, to whom she reported, changed. (TR 39). This change occurred in approximately January of 2002. (TR 40). Tangun became very hostile toward her, constantly challenging her decisions and questioning her about leaving the office early to see her trainer. (TR 39, 41). These

confrontations were upsetting to Complainant since prior to the November 2001 review committee meeting on Cholestech she had not experienced any difficulties or issues with Tangun. (TR 40). As time progressed the confrontations became more frequent. (TR 40). Complainant was terminated in July of 2002 at a meeting attended by herself, Tangun and Jim Zimcosky, Respondent's head of human resources. As the basis for terminating Complainant, Tangun accused her of sending business regarding a company called Practice Works to a competitor and of not understanding the companies she was assigned to cover. (TR 42-43). Complainant had recently started covering Practice Works. (TR 43).

Complainant testified that Sorensen's June 19, 2002 email to Tangun (RX 9), in which Sorensen complained that Complainant performed incompetently during a trip with the management of Tripos, was inaccurate. (TR 55, 62). She stated that the meeting she allegedly missed never took place and that the other errors Sorensen listed in his email were also inaccurate, as evidenced by the affidavit from Tripos CEO John McAllister. (TR 94). Complainant testified that Respondent did not terminate her employment sooner because it wanted to pursue a banking deal with Tripos. (TR 67). Complainant also testified that she was terminated because she had a contract with Respondent and that Respondent had been hoping that its actions would force her to quit. Her termination occurred only after Respondent failed to establish a banking arrangement with Tripos, a company Complainant had been covering. (TR 86). Complainant noted that her U-5, a form submitted by an employer to securities industry regulators when an employee is terminated, stated that she was terminated for "personal reason." (TR 85). According to Complainant, other Respondent employees were terminated for staff reduction reasons, but her status was different because at the time she was terminated her contract contained \$228,000 in remaining value. (TR 85). Finally, Complainant testified that, contrary to Respondent's assertions, the review committee met in November 2001 to discuss her report on Cholestech. As evidence that the meeting took place, Complainant referred to Respondent's December 12, 2002 letter to OSHA investigator Wigger (CX 87). In the letter Respondent acknowledged that the meeting took place but denied Complainant's assertion that it pressured her to change her rating. (TR 87).

On cross examination, Complainant testified that she was initially hired to cover the e-health sector, which was internet business as it related to health related products and services. (TR 93-94). Her sector was changed to healthcare information technology after she started working. Her first industry report was released in March of 2001 and before this report there was not basis to judge the first four to five months of employment. (TR 97-99). Prior to November of 2001 Complainant completed nine company reports and two industry reports. (TR 104). Her reports were reviewed by the review committee, the purpose of which was to test her knowledge of the report material. Although bankers were always present on the committee, Complainant did not complain about their presence until after she was terminated. (TR 104-106). The bankers did not tell her to change her rating on Cholestech to 'strong buy' but Complainant stated that, according to how the industry operated, it was understood that the bankers would have wanted her to change her rating. (TR 107-108). Complainant testified that she could have said she was not interested in covering Cholestech but that she elected to do so in order to keep her job, although Respondent did not directly threaten to fire her if she did not cover Cholestech. (TR 108-110). Complainant's report on Cholestech did not indicate a rating but she testified that it was common practice to not include the rating on the report itself. (TR 112). Complainant was

not directly asked at the meeting to change her rating and she did not report to anyone else who worked for Respondent that she had been pressured to change her rating. (TR 117). In relation to her job performance, Complainant disputed the statements made in writing by Tangun and further alleged that Tangun harassed her. (TR 120-123). Tangun did not tell her that she should leave but said that she “should move on.” (TR 125-126).

At the end of the hearing Complainant testified that although she had provided a potential customer with contact information for John Kreger of William Blair and Co., the reason she made the referral was not because she could not provide the potential customer with the information he sought. (TR 262). Instead, she testified that she provided the information only because the potential customer “asked me who else covers [the company in question] and I told him.” Complainant staunchly insisted that the information was not provided as a referral but given because it had been directly asked for. (TR 262-263). Complainant also testified that her current employment was with the Northeastern Clinton Central School District as a business administrator. (TR 265). She started the position in the first week of January 2003 at an annual salary was \$63,500. (TR 265-266). Following her termination from Respondent she did not seek any employment in the securities industry and only left Dallas because she could not find employment in a school setting. (TR 266). Complainant testified that she did not feel that she could get other securities employment in Dallas, although she had one non-productive interview with a securities firm. (TR 267). Her contract with Respondent was due to expire in October of 2003 and the last pay she received from Respondent was for the last two weeks in July of 2002. (TR 267). Her moving costs from Dallas to Plattsburg, New York totaled \$3,800. She claimed no medical care expenses as a result of being terminated.

Ozarslan Tangun

Tangun testified that he was an eight year employee of Respondent and was its Director of Research. (TR 130). In his capacity as analyst he focused on covering the specialty retail sector. Tangun testified that he holds a master’s degree in business administration from the University of Ohio and is a certified financial analyst. (TR 155). In addition, the *Wall Street Journal* in 2002 ranked him as the number one analyst for his sector. (TR 156). Tangun testified that as Director of Research he was responsible for managing the personnel, regulatory compliance, product quality and direction of his department. (TR 158). He stated that his and Respondent’s credibility depended on the credibility and accuracy of the analysts under his supervision. (TR 158). Tangun stated that he took part in the decision to hire Complainant but that she chose the specific business sector and companies that she would cover. (TR 131). He disagreed with her regarding the fundamentals of a company she covered called Curagen, although he admitted that he had not researched the company or spoken with the company’s management. (TR 146-148). Regarding a review committee meeting to discuss Complainant’s Cholestech report, Tangun initially testified that “[t]o the best of [his] recollection” he could not recall attending the meeting, but quickly made a definitive statement that he was not at any Cholestech meeting. (TR 154). He testified that the goal of a review committee was to determine the quality of the information provided in the report. (TR 160). Further, prior to July of 2002 there existed no rule against bankers being part of a review committee. (TR 164). Regarding Complainant’s performance, Tangun stated that he was her direct supervisor and that Complainant had a poor attendance record for the important early morning meetings conducted

by Respondent. (TR 164-165,167). Other performance related issues Tangun had with Complainant included her inability to answer questions at review committee meetings and not providing timely company updates to the sales force, particularly regarding companies DPII and Curagen. (TR 168-172). Tangun testified that to him these alleged performance deficiencies indicated that Complainant was not working diligently enough. Tangun cited an occasion on which a company called Eclipsys had issued important information but Complainant could not be reached, meaning that the sales force did not receive the information in a timely manner. (TR 179-182). Tangun further stated that Complainant's general performance was not up to the required standards and that the sales people and her own assistant, Rob Blakney, agreed with his assessment. (TR 184). The sales people, according to Tangun, felt that she was not prepared, "wasn't getting the message across," "wasn't doing evaluated research," and was not doing channel checks. (TR 184). When given feedback on her performance Tangun observed that Complainant was very defensive and in particular did not like being asked to justify her price targets. (TR 186). He noted that Complainant exhibited these performance problems relative to all of the companies she covered and that the problems had existed prior to November of 2001. (TR 188). Tangun testified that he terminated Complainant because "she failed to perform her essential duties as an [sic] senior equity analyst" and because he did not have confidence in her ratings. (TR 190).

On cross examination, Complainant questioned Tangun regarding the hand-written evaluation notes that he allegedly relied on as part of his decision to terminate her and had also supplied to the OSHA investigator. (TR 192-194). Tangun admitted that he had inaccurately dated the notes, listed as exhibit ten in Respondent's August 14, 2003 pre-hearing report, at around the time he decided to terminate Complainant's employment in June of 2002. (TR 192). Instead of writing them in January and February of 2001, as he indicated on the notes and claimed to the OSHA investigator, the notes were actually written one year later, in January and February of 2002. Tangun acknowledged that since the notes were incorrectly dated there was no documented evidence of Complainant's alleged incompetence until seventeen months after she was hired, which was also after the alleged November of 2001 meeting. (TR 193-194). He submitted that it was not his practice to immediately begin documenting problems with an employee but to wait and attempt to guide the employee, only starting to document problems after guidance efforts failed. (TR 202). Tangun also stated that Complainant's U-5 form listed "personal reasons" as the grounds for termination because the U-5 would travel with Complainant for the rest of her career. (TR 197). Listing the grounds for termination as "personal reasons" was therefore done for Complainant's benefit.

On re-direct, Tangun testified that prior to being offered to Complainant, another of Respondent's analysts had declined to cover Cholestech. This other analyst was not fired when she refused to initiate coverage. (TR 243-244). Tangun also noted that Complainant had been asked to cover Cholestech in August but did not complete her report until November, a longer than normal period of time to complete a report. (TR 244). Further, Tangun stated that even before Complainant allegedly issued her report, an analyst with another firm had issued a report on Cholestech with a 'buy' rating, meaning that Respondent no longer had an opportunity to engage in banking business with Cholestech. (TR 244-245). However, Tangun added that he only became aware of the prior report with the 'buy' rating "after," indicating that he was not aware of the other report until sometime after Complainant had completed her research of

Cholestech. In deciding whether to terminate Complainant, Tangun stated that he relied on the opinions of people outside of the research department, including Sorensen's negative opinion of Complainant's performance. (TR 246; EX 9). Tangun said he also took into consideration the email Complainant wrote to John Kreger, an employee at the competing firm William Blair and Company. (TR 247-249; EX 10). Tangun alleged that in her email Complainant explained to Kreger that she was referring a potential customer to him because she could not give the customer sufficient information. Tangun stated that this action by Complainant was an indication that she did not have sufficient knowledge of the companies she was covering. (TR 249). Tangun added that it was never proper for an analyst to refer a potential customer to a competitor. (TR 250). He also agreed that the email Complainant sent to Kreger was "the final straw that broke the camel's back" regarding his decision whether or not to terminate Complainant. (TR 247).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Interim final rules outlining the procedures for handling a complaint under the Act were published on May 28, 2003 as 29 C.F.R. Part 1980. Section 1980.104(b)(1) of the interim rules states that the elements of the *prima facie* case which a complainant must allege are as follows:

- (i). [t]he employee engaged in a protected activity or conduct;
- (ii.) [t]he [employer] knew, actually or constructively, that the employee engaged in the protected activity;
- (iii.) [t]he employee suffered an unfavorable personnel action; and
- (iv.) [t]he circumstances were sufficient to raise the inference that the protected activity was likely a contributing factor in the unfavorable action.

29 C.F.R. 1980.104(b)(1)(i-iv). The investigatory process cannot proceed without the establishment of the *prima facie* case. 29 C.F.R. 1980.104(b).

Subsection (b)2(A) of the Act states that in general an action under the Act shall be governed by 49 U.S.C. 424121(b) of the AIR Act. The whistleblower provision set forth in the Energy Reorganization Act ("ERA"), 42 U.S.C. § 5851, contains the same burden of proof standards as those included in AIR. Additionally, AIR claims have thus far been analyzed under precedent set in ERA cases. As currently established, during OSHA's initial investigative process a complainant must establish a *prima facie* case demonstrating that his or her protected activity was a contributing factor in the unfavorable personnel action indicated in their complaint. *Trimmer v. U.S. Dep't of Labor*, 174 F.3d 1098, 1101 (10th Cir. 1999). At the level of a formal hearing before an administrative law judge, the complainant must prove the same elements as required for the *prima facie* case, with the exception that complainant must prove them by a preponderance of the evidence and not by mere inference. *Trimmer*, 174 F.3d at 1101-02; *see also Dysert v. Sec'y of Labor*, 105 F.3d 607, 609-10 (11th Cir. 1997). Only if the complainant meets her burden does the burden shift to the employer to demonstrate by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the employee's behavior. *Trimmer* at 1102. When established, these elements create

an inference of unlawful discrimination. *Id.* "Contributing factor" has been interpreted to indicate any factor that has the tendency to influence the decision in question. *Marano v. Dep't of Justice*, 2 F.3d 1137 (Fed. Cir. 1993). The complainant is not required to prove that his protected conduct was a "significant," "motivating," "substantial," or "predominant" factor in a personnel action. *Id.*

Once the complainant has established by a preponderance of the evidence that the protected activity was likely a contributing factor in the adverse action, the burden shifts to the respondent. The respondent, in order to rebut complainant's assertion, must demonstrate by clear and convincing evidence that it would have taken the same adverse action even in the absence of the protected activity. 29 C.F.R. § 1980.104(c). In other words, the respondent must demonstrate by clear and convincing evidence that its motivation in undertaking the adverse action against complainant was legitimate. *See Yule v. Burns Int'l. Security Service*, Case No. 1993-ERA-12 (Sec'y May 24, 1995). Although "clear and convincing" has not been defined with precision, courts have held that as an evidentiary standard it requires a burden higher than "preponderance of the evidence" but lower than "beyond a reasonable doubt." *Id.* If respondent is able to meet this burden, the inference of discrimination is rebutted. To prevail, the complainant must then show that the rationale offered by the respondent was pretextual, i.e. not the actual motivation. *Overall v. Tennessee Valley Auth.*, Case No. 1997-ERA-53 at 13. As the Supreme Court noted in *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993), a rejection of an employer's proffered legitimate, nondiscriminatory explanation for adverse action permits rather than compels a finding of intentional discrimination. *See also Blow v. City of San Antonio*, 236 F.3d 293, 297 (5th Cir. 2001).

In its post-hearing brief Respondent makes reference to Complainant's *prima facie* case. (Respondent's Reply Closing Brief at 1). However, as the Supreme Court observed in *United States Postal Serv. v. Aikens*, 460 U.S. 709 (1983):

Where the defendant has done everything that would be required of him if the plaintiff had properly made out a *prima facie* case, whether the plaintiff really did so is no longer relevant. The [court] has before it all the evidence it needs to decide the [ultimate question of discrimination]. 460 U.S. at 713-14, 715.

More recently, the U.S. Court of Appeals for the Eighth Circuit in *Carroll v. U.S. Department of Labor*, 78 F.3d 352, 356 (8th Cir. 1996), *aff'g Carroll v. Bechtel Power Corp.*, Case No. 1991-ERA-46 (Sec'y Feb. 15, 1995) observed:

But once the employer meets this burden of production, "the presumption raised by the *prima facie* case is rebutted, and the factual inquiry proceeds to a new level of specificity." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255 (1981). The presumption ceases to be relevant and falls out of the case. The onus is once again on the complainant to prove that the proffered legitimate reason is a mere pretext rather than the true reasons for the challenged employment action and the ultimate burden of persuasion remains with the complainant at all times. *Burdine*, 450 U.S. at 253, 256.

Accordingly, the fact that Complainant has established a *prima facie* case becomes irrelevant. Rather, the relevant inquiry becomes whether Complainant has proven by a preponderance of the evidence that Respondent retaliated against her for engaging in a protected activity. *Carroll* at 356.

1) Complainant engaged in protected activity

November of 2001 meeting

In order to determine whether Complainant engaged in protected activity under the Act, it is first necessary that I determine whether or not a November of 2001 Cholestech report review committee meeting took place. Complainant has asserted that she engaged in protected activity when, at a November 2001 review committee meeting attended by her supervisors, she refused to change her rating on Cholestech stock. Complainant's evidence that the meeting occurred consists of her own assertion that it took place as supplemented by a draft copy of her Cholestech report. She testified that although she could not recall the exact date of the meeting, it occurred in November of 2001 and was attended by Hultgren, Tangun, Case, Jakely, Wile and Blakney. Respondent contends that the alleged meeting did not occur and that Complainant therefore did not engage in protected activity. Respondent offered the testimony of Tangun, who testified that he had no recollection of there being a Cholestech review committee meeting and that if there had been a meeting he had not attended it. (TR 154). He stated that his review of Respondent's records produced no information, such as internal memos, indicating that a meeting had taken place, but that it was possible that the meeting had been held. In its briefs to this Court Respondent has also denied that the meeting was ever held. However, Tangun and Respondent's credibility on this issue is diminished by the contents of Respondent's December 12, 2002 letter to the OSHA investigator. In the letter, Respondent stated:

[A]t no time was [Complainant] forced to endorse this stock as a 'strong buy.' Rather, [Respondent] maintains that the review committee questioned her inability to explain the reasoning behind her 'accumulate' rating."

This statement constitutes a definitive acknowledgement by Respondent that the November 2001 meeting did occur. That Respondent now claims that the meeting never occurred is a substantial inconsistency that harms Respondent's credibility in general and renders it non-credible on issues related to the meeting. Further, the only evidence Respondent offers on this issue is the testimony of Tangun, who admitted that it was possible that the meeting had been held. In contrast, Complainant has steadfastly maintained that the review committee meeting did take place. I therefore find her testimony to be much more credible than that of Tangun. Additional evidence that the meeting was held is provided by the Cholestech research report written by Complainant. According to both Complainant and Tangun, the established procedure in Respondent's equity research department was for a company to be researched, a report to be written based on the research, and for the report to be reviewed at a committee meeting. (TR 151). Since the evidence contains a report on Cholestech, its existence therefore suggests that the meeting transpired because the next logical step in the process would have been for the report to

be reviewed.⁵ Based on Respondent's deception, Complainant's credible testimony, and the existence of the Cholestech report, I find that the November 2001 Cholestech review committee meeting did take place.

Regarding the events that transpired at the meeting, Complainant testified that the members of the review committee attempted to pressure her into changing her Cholestech stock rating but that she refused to do so. The pressure Complainant alleges was not by way of direct orders or requests to change her rating but through intensive and aggressive questioning, primarily by Hultgren, as to why she assigned Cholestech the weaker 'accumulate' rating and not a 'strong buy' rating. Complainant testified that the exchange between herself and the review committee indicated that Respondent was very displeased with her rating, prompting Complainant to state at the end of the meeting that if Respondent insisted on issuing a rating higher than 'accumulate' she would not sign the report. Although Respondent's primary defense to Claimant's charge is its discredited assertion that the meeting never occurred, Respondent additionally asserts that Complainant's claim, even if it is found that the meeting occurred, is solely based on her perception that Hultgren wanted her to change her rating. However, Respondent is incorrect. Complainant's assertion is supported by several additional factors. First, Respondent attempted to conceal the existence of the meeting for a reason. Claimant has suggested that the concealment was motivated by Respondent as an effort to hide the securities law violation it engaged in at the meeting. I find this explanation to be credible, especially since Respondent persists in asserting, even in the face of its admission and other evidence showing otherwise, that the meeting was not held. Second, Todd Allen, in his interview with OSHA, confirmed Complainant's testimony regarding Respondent's interest in Cholestech. Specifically, Allen confirmed that Respondent was interested in entering into banking business with Complainant and that Respondent held an unfavorable view of 'accumulate' ratings, especially when it was seeking banking business with the company being rated. Allen also testified that Respondent had on several occasions pressured him to change his ratings, a charge confirming a pattern of such activity by Respondent. Although I do not give Allen's statement to OSHA as much weight as would a live, cross-examined witness, the OSHA report indicates that Allen exhibited no animosity toward Respondent and had left Respondent on good terms. His interview therefore adds weight to Complainant's assertion that she was pressured to change her Cholestech rating. Taken together, I find that the evidence shows that Complainant was pressured by Respondent to change her Cholestech stock rating at the November of 2001 meeting.

The next issue to address is whether Complainant's actions at the meeting constituted activity protected under the Act. The Act provides as follows:

⁵ Respondent asserts that because the report lacked a rating and a date it was incomplete and therefore could not have been ready for review. However, Complainant credibly explained during her testimony that it was common practice not to include certain information in a report until it was ready for final submission, an event occurring after the review committee meeting. Further, it is interesting that Tangun never seemed to have taken issue with Complainant not reaching the review committee with her Cholestech report. Tangun was her direct supervisor and made light of other seemingly much less important alleged infractions by Complainant than her having wasted three months by researching the company and not producing a reviewable report. Yet, if Tangun's testimony is to be believed, the research and report on Cholestech were just abandoned without Complainant receiving any reprimand. Tangun unconvincingly tried to distance himself from the report by refusing to even admit that Complainant wrote it, saying only that "[t]here's a report." (TR 149).

(a) Whistleblower protection for employees of publicly traded companies--No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), or that is required to file reports under section 15(d) of the Exchange Act of 1934 (15 U.S.C. 78o(d)), or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee.

(1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by--

(A) a Federal regulatory or law enforcement agency;

(B) any Member of Congress or any committee of Congress; or

(C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct).

18 U.S.C. § 1514A; *see also*, 29 C.F.R. § 1980.102. Respondent is potentially liable under the Act because it is a publicly traded company with a class of securities registered under Section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l) and is required to file reports under Section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)).

The rules propounded under the Securities Exchange Act of 1934 make the following provisions regarding manipulative practices in the purchase or sale of security:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(1) To employ any device, scheme, or artifice to defraud,

(2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

These antifraud provisions are catchalls expressly designed to thwart misrepresentations in securities trading. See *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 151 (1972); *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 859 (2d Cir. 1968) (en banc); *SEC v. Softpoint, Inc.*, 958 F. Supp. 846, 861 (S.D.N.Y. 1997), *aff'd*, 159 F.3d 1348 (2d Cir. 1998) (unpublished table decision). They are thus liberally construed to embrace a wide range of misconduct. *Softpoint*, 958 F. Supp. at 862. To prove a violation of these provisions, the party asserting that a violation has occurred must show: (1) that a misrepresented or omitted fact was made in an offer, attempt to induce a purchase or sale, or an actual purchase or sale of security; (2) that the misrepresented or omitted fact was "material"; and (3) that the respondent acted with the requisite "scienter." *Basic, Inc. v. Levinson*, 485 U.S. 224, 240 (1988); *Aaron v. SEC*, 446 U.S. 680, 701-02 (1980).⁶ The jurisdictional requirements of the antifraud provisions are interpreted broadly and are satisfied by intrastate telephone calls and even very ancillary mailings. *Softpoint*, 958 F. Supp. at 865.⁷

Misrepresentation in connection with purchase or sale of a security

Courts have interpreted broadly the requirement of Section 10(b) and Rule 10b-5 that violative conduct must occur "in connection with" the purchase or sale of a security." *Superintendent of Ins. of N.Y. v. Bankers Life and Cas. Co.*, 404 U.S. 6, 12 (1971); *In re Ames Dep't Stores Inc. Stock Litig.*, 991 F.2d 953, 964-66 (2d Cir. 1993). In general, "fraud can be committed by any means of disseminating false information into the market on which a reasonable investor would rely." *Ames Dep't Stores*, 991 F.2d at 967; *SEC v. Hasho*, 784 F. Supp. 1059, 1106 (S.D.N.Y. 1992). In *SEC v. American Commodity Exchange*, 546 F.2d 1361, 1365 (10th Cir. 1976), the court indicated that actual sales by the defendant were not necessary to establish a violation of the antifraud provision of the Securities Act. To the same effect see *United States v. Dukow*, 330 F. Supp. 360 (W.D. Pa. 1971) and *Fund of Funds Ltd. v. Arthur Andersen*, 545 F. Supp. 1314 (S.D.N.Y. 1982). "[T]he securities laws include as a seller entities which proximately cause the sale...or whose conduct is a 'substantial factor in causing a purchaser to buy a security.'" *Fund of Funds Ltd.*, 545 F. Supp. at 1353 (citing *Lawler v. Gilliam*, 569 F.2d 1283, 1287 (4th Cir. 1978)). The prediction of a substantial increase in the price of any security without a reasonable basis for making such a prediction is fraudulent. *Hasho* at 1109; *Lester Kuznetz*, 48 S.E.C. 551, 553 (1986).

The testimony indicates that a stock rating is a predictor of the future value of the stock, and that a 'strong buy' is essentially a prediction that a stock's value will increase in the future and that it is therefore a good investment. (TR 101). Respondent attempted to misrepresent the value of Cholestech's stock because it attempted to rate it at a level higher than its own expert,

⁶ Similarly, a plaintiff in the 5th Circuit must allege, in connection with the purchase or sale of securities, "(1) a misstatement or an omission (2) of material fact (3) made with scienter (4) on which plaintiff relied (5) that proximately caused [the plaintiffs'] injury." *Tuchman v. DSC Communications Corp.*, 14 F.3d 1061, 1067 (5th Cir. 1994) (quotation omitted).

⁷ The jurisdictional requirement of the Securities Act is satisfied here through Complainant's use on Respondent's behalf of the telephone system in carrying out the research necessary to prepare the Cholestech report.

Complainant, deemed accurate.⁸ Respondent's motive in issuing the higher rating was not based on the characteristics of the stock, as communicated by Complainant, but on its own interest in generating profits from a potential banking deal with Cholestech. The action of pressuring Complainant to give the stock a higher rating was therefore attempted fraud because it represents the dissemination of "false information into the market," the false information being that a honest prediction of Cholestech's value anticipated an increase in value. *see Ames Dep't Stores*. This sort of baseless prediction that a stock's value will increase in value has specifically been found to be fraudulent behavior.⁹ *Hasho*. Although not the direct issuer of Cholestech stock, Respondent remains liable because the stock ratings it provides represent a 'substantial function in causing a purchaser to buy a security.' *Fund of Funds Ltd.*¹⁰ This is confirmed by Respondent's December 13, 2002 letter to the OSHA investigator, in which it stated that its sales force dispensed "advice to [Respondent's] clients based on the analysts' valuations and recommendations" and that its purpose in maintaining the research department was to serve "both individual and institutional investors" by determining "industry trends and specific company prospects to make final projections and ultimately specific stock recommendations to institutional and retail clients." (CX 2). Respondent's misrepresentation was therefore "in connection with purchase or sale of a security" because stock buyers and sellers utilized the analysts' recommendations as provided by the sales force.

Materiality

"[M]ateriality depends on the significance the reasonable investor would place on the withheld or misrepresented information." *Basic, Inc.*, 485 U.S. at 240. Information is deemed material upon a showing that there is a substantial likelihood that the omitted facts would have assumed actual significance in the investment deliberations of a reasonable investor. A statement is misleading if the information disclosed does not accurately describe the facts, or if insufficient data is revealed. *Basic, Inc.*, 485 U.S. at 232; *see also United States v. Koenig*, 388 F. Supp. 670, 700 (S.D.N.Y 1974).

The element of materiality is satisfied here because reasonable investors do, according to the testimony, rely on Respondent's rating in making investment decisions. (TR 101). As noted above in my discussion of misrepresentation, Respondent stated that its purpose in maintaining the research department was to serve "both individual and institutional investors" by determining "industry trends and specific company prospects to make final projections and ultimately specific stock recommendations to institutional and retail clients." (CX 2). Clearly Respondent was supplying material information to investors. Respondent's influence in making relied-upon stock

⁸ It is sufficient that Respondent attempted but did not succeed in violating securities law. To find otherwise would require that a whistleblower allow the violation to occur before reporting it. This would defeat the intent of the Act and whistleblower law in general, which is to prevent the carrying out of the underlying crime.

⁹ The inaccuracy of a 'strong buy' rating is confirmed by the precipitous decline of Cholestech's stock from a high of greater than \$25 in November of 2001 to less than \$10 in August of 2003. (CX 2).

¹⁰ An example of purchaser reliance on the market information provided by Respondent was provided by potential customer Founders, a Colorado-based money management company. (TR 249). Founders had contacted Complainant to learn more information regarding a company called Practice Works. (TR 43).

recommendations is further confirmed by the Wall Street Journal article supplied by Respondent, an article which ranked Tangun as the top analyst in his industry sector. (RX 6).

Scienter

Scienter has been defined as "a mental state embracing intent to deceive, manipulate, or defraud." *Aaron v. SEC*, 446 U.S. 680, 697, 701-02 (1980); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976). Scienter is established by showing that the respondent acted intentionally or with severe recklessness. *Hackbart v. Holmes*, 675 F.2d 1114, 1117 (10th Cir. 1982). *see Broad v. Rockwell Int'l Corp.*, 642 F.2d 929 (5th Cir.), *cert. denied*, 454 U.S. 965 (1981); *see also Warren v. Reserve Fund, Inc.*, 728 F.2d 741, 745 (5th Cir. 1984); Recklessness is defined as "an extreme departure from the standards of ordinary care...which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it." *Meyer Blinder*, 50 S.E.C. 1215, 1229-30 (1992) (quoting *Sundstrand Corp. v. Sun Chem. Corp.*, 553 F.2d 1033, 1045 (7th Cir. 1977)). Proof of scienter need not be direct but may be "a matter of inference from circumstantial evidence." *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 n.30 (1983); *Pagel, Inc. v. SEC*, 803 F.2d 942, 946 (8th Cir. 1986); *Meyer Blinder*, 50 S.E.C. at 1230.

The evidence shows that Respondent's act of pressuring Complainant to change her rating was intentional. Complainant repeatedly defended her position that Cholestech should not be given a rating higher than 'accumulate,' but Respondent continued to press for a higher rating. That Respondent's act was intentional is also shown through OSHA's interview with Allen. Allen stated that Respondent was seeking to enter into a banking deal with Cholestech and that Respondent giving Cholestech a 'strong buy' rating was key to achieving that goal.¹¹ Finally, Respondent's concerted attempt to conceal the existence of the review committee meeting also shows that its actions at the meeting were deliberately and intentionally in violation of securities law.

Blowing the whistle

Respondent urges that even if Complainant's claim was true, i.e. that the meeting occurred and she was pressured to change her rating, she never "blew the whistle" because she did not provide information regarding the alleged violation in support of an investigation. However, Respondent has misinterpreted the Act. As properly read, the Act protects:

any lawful act done by the employee...to provide information...regarding any conduct which the employee reasonably believes constitutes a violation of...any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or

¹¹ Respondent asserts that it would not have been motivated to rate Cholestech as 'strong buy' in order to garner banking business because another firm had already issued a report on Cholestech giving it a 'strong buy' rating. By Respondent's reasoning, the existence of the other company's report ended any chance Respondent had to enter into a business relationship with Cholestech based on the strength of Complainant's rating. However, the testimony indicates that multiple banking companies can take part in a banking deal and that Respondent was not aware of the other report until after Complainant's had completed the report. (TR 32, 244-245). That the other company had published a report on Cholestech with a 'buy' rating therefore does not support Respondent's assertion.

assistance is provided to...a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct).

18 U.S.C. § 1514A. This interpretation is supported by the background notes included with the Act's interim final rules, which clearly delineate between, and provide protection to, both employees who report violations to their supervisors and employees who have taken part in a proceeding against an employer. The background notes state:

[The Act] provides protection to employees against retaliation...because the employee provided information to the employer or a Federal agency or Congress relating to alleged violations of [securities law]...or any provision of Federal law relating to fraud against shareholders. *In addition*, employees are protected against discrimination when they have filed, testified in, participated in, or otherwise assisted in a proceeding filed or about to be filed against one of the above companies relating to any such violation or alleged violation.

29 C.F.R. Part 1980 (emphasis added). The requirements of the Act are therefore satisfied in that Complainant refused to change her rating and thereby refused to engage in the illegal activity suggested by her managers. To accept Respondent's position would require that Complainant report Respondent's actions to some authority outside of the company.¹² The Act does not require such action by a complainant. Complainant's refusal to change her rating, done in the presence of her managers, was an act of whistleblowing protected by the Act.

Based on the foregoing, I conclude that Complainant has, by a preponderance of the evidence, proven that she engaged in activity protected under the Act.

2) Respondent was aware of Complainant's protected activity

Complainant testified that her immediate supervisor Tangun and Respondent's CEO Hultgren were present at the November of 2001 meeting when she engaged in protected activity. Respondent has asserted that this meeting did not take place, in effect arguing that it did not have awareness of the protected activity. However, Respondent's argument is not supported as I have found that the November of 2001 meeting did take place. I therefore find that Complainant has proven by a preponderance of the evidence that Respondent was aware of her protected activity by showing that Tangun and Hultgren were present at the meeting.

3) Complainant suffered an unfavorable personnel action

The Act provides that an employer may not "discharge . . . or in any other manner discriminate against an employee in the terms and conditions of employment" as a result of the employee engaging in protected activity. 18 U.S.C. § 1514A(a); *see also* 49 U.S.C. § 42121(a); *see also* 29 C.F.R. § 1979.102(a). Because Respondent terminated Complainant employment on

¹² She would have been required to contact outside authorities to meet Respondent's definition of "report" since the individuals she would have made an internal report to, namely Tangun and Hultgren, were members of the review committee.

July 31, 2002 I find that Complainant has proven by a preponderance of the evidence that she suffered an adverse employment action.

4) Complainant's protected activity was a contributing factor to the adverse employment action

Complainant has proven by a preponderance of the evidence that she engaged in activity protected under the Act, that Respondent was aware of her protected activity, and that Respondent took adverse action against her. As Complainant has established the first three factual predicates, at question here is Complainant's proof of the final factual predicate of her case: that her protected activity was a contributing factor in the adverse action taken against her. See 49 U.S.C. §42121(b)(2)(B)(iii); *see also* 29 CFR 1980.104(b)(1)(iv).

As with most cases of discrimination or retaliation, the instant case lacks direct evidence of intent. See *Lockhart v. Westinghouse Credit Corp.*, 879 F.2d 43, 48 (3d Cir. 1989). However, a complainant is not required to demonstrate specific knowledge that the respondent had intent to discriminate against her. Instead, the complainant may demonstrate the respondent's motivation through circumstantial evidence of discriminatory intent. See *Frady v. Tennessee Valley Authority*, 92-ERA-19 and 34, slip op. at 10 n. 7 (Sec'y Oct. 23, 1995); *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1162 (9th Cir. 1984)(quoting *Ellis Fischel State Cancer Hospital v. Marshall*, 629 F.2d 563, 566 (8th Cir. 1980)).

In *Timmons v. Mattingly Testing Services*, 95- ERA-40 (ARB June 21, 1996), the Board reviewed principles governing the evaluation of evidence of retaliatory intent in ERA whistleblower cases. The Board indicated that where a complainant's allegations of retaliatory intent are founded on circumstantial evidence, the fact finder must carefully evaluate all evidence pertaining to the mindset of the employer and its agents regarding the protected activity and the adverse action taken. The Board noted that there will seldom be eyewitness testimony concerning an employer's mental process. Fair adjudication of whistleblower complaints requires "full presentation of a broad range of evidence that may prove, or disprove, retaliatory animus and its contribution to the adverse action taken." *Id.* at 5. The Board continued:

Furthermore, a complete understanding of the testimony of the witnesses, including testimony regarding technical procedures, is necessary for the drawing of pertinent inferences and the resolution of conflicts in that testimony.

Id. at 5-7 (citations omitted).

The Secretary has noted that, when addressing Complainant's proof of a *prima facie* case, one factor to consider is the temporal proximity of the subsequent adverse action to the time the respondent learned of the protected activity,. *Jackson v. Ketchikan Pulp Co.*, 93-WPC-7 and 8 (Sec'y Mar. 4, 1996); *Conway v. Valvoline Instant Oil Change, Inc.*, 91-SWD-4 (Sec'y Jan. 5, 1993). As I noted above, the question of a *prima facie* case at this point in the proceedings is irrelevant. I address the question of temporal proximity, however, as the timing between the protected activity and adverse employment action can be circumstantial evidence of discrimination, regardless of whether the issue is satisfaction of a *prima facie* case or otherwise.

Findings of causation based on closeness in time have ranged from two days, (*Lederhaus v. Donald Paschen & Midwest Inspection Service, Ltd.*, 91-ERA-13 (Sec'y Oct. 26, 1992), slip op. at 7), to about one year (*Thomas v. Arizona Public Service Co.*, 89-ERA-19 (Sec'y Sept. 17, 1993)). On the other hand, just as temporal proximity may be a factor in showing an inference of causation, the lack of it also is a consideration, especially if a legitimate intervening basis for the adverse action exists. *Evans v. Washington Public Power Supply System*, 95-ERA-52 (ARB Jul. 30, 1996) (citing *Williams v. Southern Coaches, Inc.*, 94-STA-44 (Sec'y Sept. 11, 1995)). In *Tracanna v. Arctic Slope Inspection Service*, ARB No. 98-168, ALJ No. 1997-WPC-1 (ARB July 31, 2001), the ARB held that temporal proximity did not always provide a reasonable inference of discrimination:

Temporal proximity may be sufficient to raise an inference of causation in a whistleblower case. *See, e.g., Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989). When two events are closely related in time it is often logical to infer that the first event (e.g. protected activity) caused the last (e.g. adverse action). However, under certain circumstances even adverse action following close on the heels of protected activity may not give rise to an inference of causation. Thus, for example, where the protected activity and the adverse action are separated by an intervening event that independently could have caused the adverse action, the inference of causation is compromised. Because the intervening event reasonably could have caused the adverse action, there no longer is a logical reason to infer a causal relationship between the activity and the adverse action. Of course, other evidence may establish the link between the two despite the intervening event. As the court held in *Farrell v. Planters Lifesavers Co.*, 206 F.3d 271, 279 (3d Cir. 2000), "we have ruled differently on this issue [raising an inference of retaliatory motive based on temporal proximity] . . . depending, of course, on how proximate the events actually were, and the context in which the issue came before us." (Emphasis added.)

Slip op. at 7-8 (footnote omitted).

At first glance, this case would appear to be one that could not be supported by the proximity in time between the alleged protected activity and the adverse employment action. As Respondent correctly points out, the period of time between these two events is greater than eight months. It was this difference in time that OSHA concluded was of long enough duration to indicate that Complainant's termination was not motivated by her having engaged in protected activity. However, as noted in *Thomas v. Arizona Public Service Co.*, evidence of discriminatory intent has been found in instances where the protected activity and the discriminatory event were separated by one year. Further, OSHA reached its determination in part based on the fact that Respondent produced notes indicating performance problems from Complainant's employment file that were dated prior to the November 2001 meeting, thus supporting Respondent's claim that action taken against Complainant were not motivated by a discriminatory intent. These notes would tend to show that the post-November of 2001 notes and discussion with Complainant regarding her performance were not a response to her protected activity but were in fact a legitimate continuation of notes detailing prior concerns regarding performance. But the evidence does not support this finding because at the hearing Tangun admitted that the notes

were not written prior to November 2001 but several months later. With these memos removed from consideration, it becomes possible for Complainant to show, through temporal proximity between her protected activity and Respondent's adverse employment action, that her termination was motivated by her having engaged in protected activity at the November 2001 meeting.¹³ This is because the record contains no evidence of Complainant's allegedly poor performance until after the November 2001 meeting. Standing between Complainant and her goal are several intervening pieces of evidence. This evidence consists of Tangun's testimony along with several emails sent in April and June of 2001. As noted, Complainant has succeeded in greatly reducing Tangun's credibility in the eyes of this Court. Further, in light of Respondent's diminished credibility regarding previously discussed issues, such as the occurrence of the review committee meeting, I must give the April and June 2001 emails little weight as far as substantiating Respondent's claims regarding its motives. This decision is confirmed by the evidence presented by Complainant. Not only did Complainant testify in a credible manner that, contrary to Respondent's claims, she was a competent employee and that numerous of Respondent's accusations were unsupported, she also supplied the affidavits of several individuals who had first hand knowledge of her job performance. With regard to the June 19, 2002 email from Sorensen to Tangun detailing Complainant's allegedly poor performance during the trip with the management of Tripos, Complainant denied Sorensen's accusations. Complainant offered the sworn affidavit of Tripos CEO McAlister, who refuted each of Sorensen's accusations against Complainant. Complainant also provided testimony that called into question Respondent's intent in sending the June 28, 2002 memos. In these memos Case purported to be notifying Tangun that Complainant had not appeared at the daily morning meeting and could not be reached, resulting in the sales force not receiving important information on a company called Eclipsys. But Complainant testified that she had already alerted the sales force regarding the information on Eclipsys, a claim Respondent did not deny. What Respondent is left with regarding these emails is few minor disagreements with Complainant regarding the hours she was to be in the office and how she would utilize the services of her assistant.¹⁴

Further, even if the email could be supported, Respondent claimed that the event that actually precipitated Complainant being terminated, the "final straw that broke the camel's back," was not Complainant's allegedly poor performance but her referral of a potential customer to a competitor. As I discuss *infra*, Complainant has shown that Respondent's claim involving this event is also not supported.

The strongest support for Complainant's claim that her protected activity was the proximate cause of her termination is Respondent's general dishonesty regarding a number of the key issues found in this matter. First are the hand-written notes that Tangun admitted were inaccurate but had still supplied to the OSHA investigator. He claimed that the error was a result of a mistake he made in June of 2002 while preparing to terminate Complainant. However, at

¹³ To rule otherwise, i.e. that to make a finding based on a temporal relationship required close proximity in time between events, would mean that to avoid liability under the Act an employer would only have to wait a certain amount of time before terminating a whistleblowing employee.

¹⁴ I note that the extensive job offer letter Respondent provided to Complainant does not address issues relating to required office hours and how she was to manage her assistant, thus indicating that Complainant had, as she asserted, a reasonable expectation of latitude in these matters.

this point in the discussion it seems to me unlikely that Tangun's action in incorrectly dating the notes was the result of a mistake. This is especially true given the careful, well-documented manner in which Tangun later solicited commentary on Respondent's performance, particularly when he sought it from Sorensen. Rather the notes, which Tangun claimed remained undated and unsigned in Complainant's employment file for almost a year and a half, were more likely created by Tangun at some point following the November 2001 meeting in order to establish a record of complaints made against Complainant prior to her protected activity. At best, Tangun represents an unreliable source of information. At worst, his actions show an attempt by Respondent to fabricate evidence in support of its claims. Respondent was also not credible regarding the occurrence of the review committee meeting. As previously discussed, Respondent's dishonesty regarding the meeting greatly reduces its credibility and strongly implies that its actions in dealing with Complainant were motivated by a discriminatory intent.

Finally, there is an important discrepancy among Respondent's various statements regarding why it terminated Complainant's employment. In its briefs, statements to OSHA, and testimony at the hearing, Respondent stated that Complainant was terminated for reasons related to her job performance and referral of a potential client to a competitor. Yet in the U-5 form it submitted to securities industry regulators, Respondent stated that Complainant was terminated for "personal reasons." When questioned as to a reason for the discrepancy, Tangun claimed that "personal reasons" was listed on the U-5 in order to protect Complainant's career interests. As Tangun explained, the U-5 is a document that accompanies an employee throughout his or her career in the securities industry. He offered that because of the immutable nature of the U-5, not stating that the actual reason for Complainant's termination was performance-based was done for her benefit. This explanation is problematic as it presents another instance in which Respondent has provided conflicting statements regarding a key issue in this matter. Further, it is an admission that Respondent intentionally submitted inaccurate documents to securities regulators, a possible violation of securities law.¹⁵ The result is that Respondent's credibility has again been damaged. And, by pointing out this inconsistency, Complainant has significantly bolstered her claim that Respondent was motivated to terminate her employment because she had engaged in protected activity.

Based on the foregoing analysis, I conclude that the intervening events indicated by Respondent are pretextual. I therefore find that Complainant has proven by a preponderance of the evidence that her protected activity was a contributing factor in the adverse employment action taken against her.

¹⁵ In *Herzfeld & Stern, Inc. v. Beck*, a defamation claim, the court reasoned that federal law had established a comprehensive system of oversight and self-regulation by the New York Stock Exchange (NYSE) in order to ensure adherence by members of the industry to both the statutory mandates and ethical standards of the profession, and concluded that the NYSE's disciplinary function conforms to the requirements of a quasi-judicial administrative proceeding. *Herzfeld & Stern, Inc. v. Beck*, 572 N.Y.S.2d 683 (N.Y. App. Div. 1991), *appeal dismissed*, 79 N.Y.2d 917 (1992). Therefore, statements made on a Form U-5 and later used as the basis for an NYSE investigation were considered "statements uttered in the course of a judicial or quasi-judicial proceeding." *Id.* at 683. Respondent's intentional misstatement on Complainant's U-5 is therefore of a serious nature as it was accomplished in the course of a "quasi-judicial administrative proceeding."

Respondent's burden to articulate a legitimate, non-discriminatory rationale

If a complainant demonstrates that her protected activity contributed to a respondent's adverse employment action, the respondent then has a burden to produce evidence that the adverse action was motivated by a legitimate, nondiscriminatory reason. 49 U.S.C. § 42121 (b)(2)(B)(iv). Relief may not be ordered if the respondent demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of any protected behavior. 29 C.F.R. §1979.109(a). Respondent has offered two non-discriminatory rationales to justify its termination of Complainant's employment: Complainant's poor work performance and Complainant's referral of a potential client to a competitor.

Poor Performance

As evidence of Complainant's poor work performance Respondent has offered the April and June 2002 emails along with the testimony of Tangun, who was Complainant's direct supervisor. As discussed above, I have found the emails to be of dubious reliability. They therefore do not support Respondent's claims regarding Complainant's job performance. Tangun's testimony regarding Complainant's work performance is similarly unconvincing as I have found him to be of low credibility. In contrast, Complainant, whose credibility has not been tarnished, testified that the majority of Respondent's accusations regarding her job performance were unfounded. In support of her testimony she offered the affidavits of John McAlister, Jacqueline Doeler, John Kreger and Allan Kells. These affiants generally professed that Complainant was a skilled, knowledgeable and ethical analyst who understood the companies she covered and performed her job admirably. Weighed properly, this evidence does not show by a clear and convincing degree that Respondent terminated Complainant's employment for legitimate, non-discriminatory reasons. The evidence does not even meet the lower preponderance of the evidence standard.

Referral of potential customer to competitor

The second non-discriminatory basis put forth by Respondent was Complainant's alleged referral of a potential client to a competitor. Respondent's claim is based upon the contents of Complainant's July 18, 2002 memo from Complainant to John Kreger, an employee of Respondent's business competitor William Blair and Co. Respondent asserts that the contents of the memo not only showed that Complainant had made the referral, an act of disloyalty, but also showed that Complainant lacked the information to provide information that she should have known, thereby indicating that she was incompetent. Tangun testified as to the contents of the memo and provided his opinion that it was never appropriate for an analyst to make such a referral. However, the evidence does not support Respondent's contentions regarding this email. Complainant, the author of the email, emphatically stated at the hearing that she had not written the email to order a customer away from Respondent but instead had written it in response to a direct request from Founders employee Craig Behnke. The record provides strong support for Complainant's claim. The entire text of the memo is as follows: "You might be getting a call from Craig Behnke at Founders about PRW. [C]alled here and we talked a little but he wanted a little more granularity that I thought I provided. I told him you're the senior guy, etc....[.]" At no point in the memo did Complainant state or imply that she was referring the customer. Further,

the memo does not show that Complainant lacked knowledge of the company being inquired about. That Behnke “wanted a little more granularity that [Complainant] thought [she] provided” actually implies that she provided the information being sought. The appropriateness of Claimant’s action in sending the email is confirmed by the affidavit of Jacqueline Doeler, who offered that in researching a particular company she would speak with multiple analysts before acting on a stock recommendation. (CX 8). Considering Doeler’s statement, Complainant’s email appears to be just her effort to alert McAlister that Behnke was carrying out the same sort of multi-analyst information gathering practiced by Doeler. Todd Allen’s interview with OSHA also confirmed Complainant’s position regarding the meaning of the email:

Allen corroborated the complainant’s contention that by informing a potential customer of who provided coverage on the stock the complainant was not referring business to a competitor. Instead she was doing her job. If [Complainant] had withheld the information she would have appeared as though she didn’t know anyone else. That would have meant she was incompetent.

(CX 14). Taken together, the available evidence does not support Respondent’s contention that Complainant had referred a potential customer to a competitor.

Respondent has failed to establish, by clear and convincing evidence, the existence of legitimate, nondiscriminatory grounds for Complainant's termination. I have analyzed the grounds for termination advanced by Respondent individually, and, when I consider the evidence offered by Respondent as a whole, I continue to find that Respondent has failed to meet its burden.

CONCLUSION

The record demonstrates that Complainant proved by a preponderance of the evidence that her protected activity was a contributing factor to the adverse employment action she suffered. Furthermore, Respondent has not proven a legitimate, nondiscriminatory reason for Complainant's termination.

RELIEF

The Act allows for a prevailing complainant to be awarded the following:

- (A) reinstatement with the same seniority status that the employee would have had, but for the discrimination;
- (B) the amount of back pay, with interest; and
- (C) compensation for an special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and any reasonable attorney fees.

18 U.S.C. § 1514A(c)(2).

The AIR 21 Act, as propounded at 29 C.F.R. §1979.109(b), provides:

If the administrative law judge concludes that the party charged has violated the law, the order shall direct the party charged to take appropriate affirmative action to abate the violation, including, where appropriate, reinstatement of the complainant to that person's former position, together with the compensation (including back pay), terms, conditions, and privileges of that employment, and compensatory damages. At the request of the complainant, the administrative law judge shall assess against the named person all costs and expenses (including attorneys' and expert witness fees) reasonably incurred.

The statute and implementing regulations of the Act clearly provide for the award of back pay. 18 U.S.C. § 1514A(c)(2); 49 U.S.C. §42121(b)(3)(B)(ii); 29 C.F.R. §1979.109(b). The purpose of a back pay award is to make the employee whole, that is, to restore the employee to the same position she would have been in if not discriminated against. Back pay awards should, therefore, be based on the earnings the employee would have received but for the discrimination. *See Blackburn v. Metric Constructors, Inc.*, 86-ERA-4 (Sec'y Oct. 30, 1991). A complainant has the burden of establishing the amount of back pay that a respondent owes. *See Pillow v. Bechtel Construction, Inc.*, 87-ERA-35 (Sec'y July 19, 1993). Because back pay promotes the remedial statutory purpose of making whole the victims of discrimination, "unrealistic exactitude is not required" in calculating back pay. *EEOC v. Enterprise Ass'n Steamfitters Local No. 638*, 542 F.2d 579, 587 (2d Cir. 1976)(quoting *Hairston v. McLean Trucking Co.*, 520 F.2d 226, 233 (4th Cir. 1975)). Uncertainties in establishing the amount of back pay to be awarded are to be resolved against the discriminating party, however. *McCafferty v. Centerior Energy*, 96-ERA-6 (ARB Sept. 24, 1997). Interim earnings at a replacement job are deducted from back pay awards. *Williams v. TIW Fabrication & Machining, Inc.*, 88-SWD-3 (Sec'y June 24, 1992). Evidence that the complainant failed to mitigate damages will reduce the amount of the back pay owed. The respondent has the burden of establishing that the back pay award should be reduced because the complainant did not exercise diligence in seeking and obtaining other employment. *West v. Systems Applications International*, 94-CAA-15 (Sec'y Apr. 19, 1995).

Complainant seeks the value of her contract remaining after her July 31, 2002 termination, which she estimates to be worth \$228,000. Although I agree with Complainant that, based on the Act and applicable regulations and case law, she is entitled to the remaining value of the contract, my calculations produce a different value for her relief. The testimony provided and Respondent's offer letter indicates that Complainant's annual salary over the three years of her contract would be \$100,000 plus a guaranteed minimum annual bonus of \$50,000. At the time of her termination, fourteen months remained on her contract and she had only received the first year's bonus. The fourteen month's worth of remaining annual salary is equivalent to \$116,666.67. Once the remaining two years in bonuses is added to this figure, the total remaining value of Complainant's contract is \$216,666.67. However, this figure must be reduced by the \$63,500 in annual salary Complainant received from the Northeastern Clinton Central School District for her work as a business administrator. *Williams v. TIW Fabrication & Machining, Inc.* She started this position at the beginning of January of 2003, at which time nine months would have remained on contract with Complainant had she not been terminated. Nine months of the school district salary is equivalent to \$47,625 and reduces the salary amount Respondent owes

Complainant to \$169,041.62. I therefore find that Complainant is entitled to back pay in the amount of \$169,041.62.

Interest

A back pay award is designed to make whole the employee who has suffered economic loss as a result of an employer's illegal discrimination and the assessment of prejudgment interest is necessary to achieve this end. Prejudgment interest on back pay recovered in litigation before the Department of Labor is calculated, in accordance with 29 C.F.R. § 20.58(a), at the rate specified in the Internal Revenue Code, 26 U.S.C. § 6621. The employer is not to be relieved of interest on a back pay award because of the time elapsed during adjudication of the complaint. *See Palmer v. Western Truck Manpower, Inc.*, 85-STA-16 (Sec'y Jan. 26, 1990) (where employer has the use of money during the period of litigation, employer is not unfairly prejudiced); *Blackburn v. Metric Constructors, Inc.*, 86-ERA-4 (Sec'y Oct. 30, 1991). I therefore find that Complainant is entitled to interest on her back pay.

Special Damages

The Act contemplates the possible award of special damages for costs associated with the litigation. 18 U.S.C. § 1514A(c)(2)(C). Complainant was pro se in this matter and has not indicated that she is seeking to be compensated by Respondent for the legal expenses she encountered in pursuing her claim. She is therefore not entitled to any special damages.

Additional expenses

The Act allows that “an employee prevailing in any action under [the Act] shall be entitled to all relief necessary to make the employee whole.” 18 U.S.C. § 1514A(c)(1). Complainant testified that as a result of her termination by Respondent she encountered \$3,800 in moving expenses. Respondent has not contested this figure and I find it to represent a reasonable amount. Further, I find that the Act under 18 U.S.C. § 1514A(c)(1) allows for her to be compensated for moving expenses encountered as a result of an employer’s discriminatory behavior. I therefore find that Complainant is entitled to \$3,800 in moving expenses.

Although Complainant testified that she sought counseling as a result of harassment by Respondent and provided supporting documentation from her counselor, she failed to provide any figures detailing the cost of such treatment. Further, she testified that she was not seeking compensation for the counseling. I therefore find that compensatory damages for mental anguish are not available to her.

ORDER

IT IS HEREBY ORDERED that Respondent, South West Securities, Inc.:

1. Pay to Complainant back pay and other relief in the amount of \$169,041.62;

2. Pay to Complainant interest on back pay from the date the payments were due as wages until the actual date of payment. The rate of interest is payable at the rate established by section 6621 of the Internal Revenue Code, 26 U.S.C. § 6621;
3. Pay to Complainant for her moving expense in the amount of \$3,800.

A

PAUL H. TEITLER
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE OF APPEAL RIGHTS: This decision shall become the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1980.110, unless a petition for review is timely filed with the Administrative Review Board ("Board"), US Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington DC 20210, and within 30 days of the filing of the petition, the ARB issues an order notifying the parties that the case has been accepted for review. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily shall be deemed to have been waived by the parties. To be effective, a petition must be filed within ten business days of the date of the decision of the administrative law judge. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt. The petition must be served on all parties and on the Chief Administrative Law Judge at the time it is filed with the Board. Copies of the petition for review and all briefs must be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. *See* 29 C.F.R. §§ 1980.109(c) and 1980.110(a) and (b), as found in "OSHA, Procedures for the Handling of Discrimination Complaints Under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002"; Interim Rule, 68 Fed. Reg. 31860 (May 29, 2003).